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SANSHIN (M) SDN BHD

v.

GWENKENS SECURITY SERVICES SDN BHD

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HIGH COURT MALAYA, ALOR SETAR
HO MOOI CHING JC
[CIVIL SUIT NO: 22-212-2006]
31 DECEMBER 2009

C ***TORT:*** *Negligence - Professional negligence - Armed escort accompanying lorry with cargo from factory to airport - Hijacking - Whether defendant had taken all appropriate steps to safeguard plaintiff's interests - Particulars of negligence, whether proven*

D The plaintiff ('Sanshin') had appointed the defendant ('Gewnkens') to provide an armed escort service consisting of an armed escort and another security guard to accompany a lorry with its cargo from its factory in Sungai Petani to Bayan Lepas Airport, Penang. While on its way to the airport under the escort of two of Gwenken's agents, about 300 metres from Sanshin's factory, there was a E robbery involving both the lorry and its cargo. The lorry was subsequently recovered while the cargo was not. The plaintiff was indemnified for the cost of the cargo (RM737,580) by MUI Continental Insurance Bhd and this claim was brought by the plaintiff for the insurers. The plaintiff alleged that, in breach of the F terms of the agreement, the defendant's servants or agents who were escorting the lorry had failed to take appropriate action to prevent the hijacking or to protect the cargo; alternatively, the plaintiff claimed in negligence. The defendant, however, contended that it had taken all appropriate steps to safeguard the plaintiff's interests G and had adhered to all the procedures in the Standard Operating Procedure ('SOP') agreed to between the parties, and that the loss was due wholly to the plaintiff's negligence.

Held (allowing the plaintiff's claim):

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(1) On the facts, (i) and (v) of the particulars of negligence in para. 8 of the plaintiff's statement of claim were proved on a balance of probabilities. Unlike the case of *Smart Modular Technologies Sdn Bhd v. Federal Express Services (M) Sdn Bhd* I where the defendant was a general courier and not a specialist company providing high security transport services, the

defendant in the present case was engaged to provide an armed escort after being made aware of two previous hijacking attempts. The defendant would have discharged its responsibility by keeping the lorry within sight and reporting the incident to the police, but there was no proof that there such a report was made. As for the failure to use firearms, this court accepted the explanation of SD1 (one of Gwenken's agents) and SD2 (Gwenken's regional security consultant) that the use of firearms was not advisable as there was heavy traffic on the road and SDI did not shoot at the lorry as he was unsure if the driver was still in it. *Smart Modular Technologies Sdn Bhd v. Federal Express Services (M) Sdn Bhd* (dist). (para 9)

(2) Although it was pleaded that the loss was caused wholly by Sanshin's negligence, on the facts, particulars (i) - (iii) of para. 11 of the statement of defence were not made out as SD2 candidly admitted that he was told of two prior hijacking attempts. It was, therefore, incumbent on SD2, rather than Sanshin, to brief Gwenken's agents about those attempts and how to prepare in the event of a hijacking. The failure to engage an extra driver did not amount to negligence as it was not shown how such a measure would have helped. Similarly, it was not shown that the timing of the journey was the sole cause of the loss. Contributory negligence was not in issue. Counsel for the defendant conceded that he did not challenge the value of the cargo and despite the fact that the liability was totally out of proportion to the fee for the assignment (RM100), the plaintiff had proved its case. (para 10)

Case(s) referred to:

Smart Modular Technologies Sdn Bhd v. Federal Express Services (M) Sdn Bhd [2006] 2 SLR 797 ***(dist)***

For the plaintiff - Geetha Jothilingam; M/s Matthew Thomas & Co

For the defendant - George Varughese (Mohan Kumaran with him); M/s Tajul Arafat & Assoc

Reported by Suresh Nathan

JUDGMENT

Ho Mooi Ching JC:

[1] It is undisputed that the plaintiff ('Sanshin') had appointed the defendant ('Gwenkens') to provide an armed escort service consisting of an armed escort and another security guard to

accompany the lorry PDG 7354 ('the lorry') with its cargo consisting of 3,000 CDR/RW DVD drives from its factory in Sungai Petani to Bayan Lepas Airport, Penang on 12 December 2003. While on its way to the airport under the escort of two of Gwenken's agents, about 300 metres from Sanshin's factory, there was a robbery involving both the lorry and its cargo. It is not disputed that the scene of the hijacking was dark and it was drizzling at the material time. The lorry was subsequently recovered while the cargo was not. The plaintiff claimed the sum of RM737,580 being the cost of the cargo, RM10,383 being the costs of the adjuster, interest and costs. The plaintiff had been indemnified in the amount of RM737,580 by MUI Continental Insurance Bhd and the claim was brought by the plaintiff for the insurers. I gave judgment for the plaintiff in the sum of RM737,580 interest at 4% per annum on the judgment sum from 12 December 2003 till settlement and costs; and the defendant now appeals against that decision.

[2] In its statement of claim, the plaintiff alleged that in breach of the terms of the agreement, the servants or agents of the defendant who were escorting the lorry had failed to take appropriate action to prevent the hijacking or to protect the cargo. In the alternative, the plaintiff claimed in negligence. The defence was that the defendant had taken all appropriate steps to safeguard the interests of the plaintiff and adhered to all the procedures in the Standard Operating Procedure (SOP) that was agreed to between the parties; and the loss was caused wholly as a result of the plaintiff's negligence. There was no plea of contributory negligence. Gwenkens still remain the security service provider for Sanshin until the time of the trial.

[3] The lorry driver (SP2) testified that on arrival in front of the Hwang Shing factory before entering the north-south highway, he was overtaken by a green Proton Waja which forced his lorry to a stop. Four Indian men alighted from the car, the window on the driver's side was broken and four men entered the lorry. SP2 was bound and his eyes taped. He could not say whether the hijackers were armed. The lorry moved on in less than a minute and after about 20 minutes, he was let out of the lorry into the bushes beside the highway. He untied himself, went to the Sungai Petani toll house and contacted his superior in the transport company who took him to lodge a police report. He knew that the escort car was behind his lorry when he left Sanshin's factory.

[4] Chief Inspector Farhana (SP3) from the Sungai Petani Police Station, the station closest to the scene of the crime confirmed that reports were lodged by SP2 and one Ranjeet Singh, the warehouse manager of Sanshin. Both Gwenken's agents Balakrishnan a/l Ramasamy (SD1) and the driver Haridass a/l Raju of the escort car were detained for investigations on 13 December 2003 when they went to the police station with their superior, one Alan Tan (since deceased) and subsequently released. According to SP3, when the police receive a telephone call to the Pusat Kawalan Daerah reporting a crime, the recipient must lodge a first information report ('FIR') and make the appropriate entry in the log book but in this case, no FIR was made. She could not say if a '999' call was made but Balakrishnan told her that he contacted En Ibrahim who worked in the defendant's Control Room who in turn contacted Alan Tan. Under cross-examination, she said that she did not know if the defendant had contacted Team Viper which was the police team set up to counter lorry hijackings involving valuable goods. According to her investigations, the lorry stopped three times, once at Jalan Satu, the second time at the toll booth and the third time, when it stopped to let SP2 out.

[5] Balakrishnan (SD1) testified that on leaving the plaintiff's factory, he was seated in the rear of the car ('BCW') driven by his colleague Haridass. They were immediately behind the lorry but when the lorry stopped at a T-junction about 50 m from the factory, another car overtook them and came between the lorry and BCW. Because of a heavy drizzle and visibility was poor. About 300 m from the factory as they were approaching a sharp bend, a Proton Waja overtook both BCW and the car in front of it, so that the Waja was now immediately behind the lorry. Then the lorry suddenly stopped and Haridass informed him there was a Proton Satria stationary in front of the lorry. SD1 saw 2 dark-complexioned persons alighting from the right and left rear doors of the Waja and dashing towards the lorry. He could not see what happened after that as it was dark and the cars in front of BCW obstructed his view. Suspecting that something was amiss, he called one Ibrahim the defendant's operations controller to report what was happening and was instructed to keep watch of the lorry. Less than a minute after it had stopped, the lorry moved, picked up speed and headed towards the Sungai Petani Selatan toll booth. Haridass and SD1 followed.

[6] SD1 explained that he had not fired any shot because he was uncertain what had transpired and according to the SOP, in such situations he was supposed to keep a close watch and monitor the situation before using his firearm. Moreover, traffic was heavy, visibility was poor and he was not allowed to open fire where it posed a threat to members of the public. Thuraisingam, the Regional Security Consultant of the defendant instructed him not to open fire in that situation. He kept both the control room and Thuraisingam informed of what was happening. He only called the Control Room and no one else. BCW exited ahead of the lorry at the Sungai Petani Selatan toll booth and parked about 20 m away from the toll booth, to see whether the lorry would head for the Bertam exit. After waiting about 2-3 minutes, an unidentified speeding vehicle collided into the rear of BCW and sped off. They could not start BCW after the collision and saw the lorry passing them towards the Butterworth exit. He and Haridass then walked towards the toll booth as there was sometimes a patrol car there but it was not there on that night. They were later met by Alan Tan and all of them tried to locate the lorry but failed to do so and went back to the Sanshin factory. He did not see SP2 being abandoned by the bushes and agreed that had they been following the lorry, they would have seen this.

[7] Contrary to what was pleaded in the defence, SD2 Gwenken's regional consultant admitted that he had been informed of two previous hijacking attempts by Sanshin's manager, Yap Chee Fean ('Yap') who engaged Gwenken's services on an urgent basis because of that. In view of the urgency, the service was provided on terms verbally agreed between Yap and him. Charges were agreed at RM100 per run for a trip to the Penang Airport. There was an attempt to bring in evidence of limitation of liability but as this was not pleaded, such evidence was not allowed. It was pleaded in para. 6 of the defence that as soon as Gwenken's guard became aware of the hijacking by five unidentified men, he informed the operations control room and the control officer immediately informed the Sungai Petani Police station, Bertam Police station and the VIPERS office at Bukit Aman. It was further pleaded that 'Prosedur ini adalah kaedah-kaedah yang ditetapkan dalam Prosedur Standard Operasi (Standard Operating Procedure) yang dinasihati dan dipersetujui oleh plaintif sebelum perlantikan defendan oleh plaintif bagi membekalkan perkhidmatan kawalan iringan tersebut'.

[8] The defence placed a lot of emphasis on its SOP but SD2 admitted that the SOP (P12) was never given to the plaintiff. Under cross-examination, he agreed that the SOP given to Sanshin was P13 but he later contradicted himself by saying that P13 was only given at a post-mortem meeting held three days after the hijacking. In P12, there is no provision regarding any action that a guard must take in the event of a hijacking. SD2 said that every armed guard is briefed and given a copy of the SOP but SD1 who had been an armed guard with Gwenkens since 2000 said that although he had been briefed he had never been given any SOP. SD2 first agreed that P13 was the SOP given to Yap and that it governed the procedures to be adhered to in protecting the plaintiff's goods, then changed his mind under re-examination and said that it was only given three days after the hijacking in question at a post-mortem meeting. For an undisclosed reason, the plaintiff did not call Yap who was directly involved in negotiations with SD2 and who would have been able to say whether P13 was handed to him. In the event, I found it not proved that P13 was applicable. Paragraph 6 of the defence stated that there was an agreed SOP but P12 made no mention of the matters set out in para. 6 of the defence and P12 was admittedly not given to Yap. It could not have been the agreed SOP. As for the portion of P13 entitled 'Sanshin Freight Security Procedure', para. 5c makes specific reference to hijacks and para. 5(c)(3) provides that 'Both the escort vehicles must inform the police follow by the command center' *(sic)*. I accept that P13 was only created subsequent to the hijacking because it provides for two escort cars to accompany 1 truck whereas there was only one on the night in question.

[9] Nonetheless, I found that there was negligence in that the guards failed to keep the lorry in sight because SD1 admitted that it was standard operating procedure to trail the lorry and the manager Alan Tan's instructed him to do so after he reported the hijacking. He agreed that he did not follow instructions but overtook the lorry instead. He blamed this on the heavy traffic and the fact that the lorry took the cash lane while they took the 'touch n go' lane. Even if the heavy traffic had been heavy, it is difficult to see why BCW could not have followed the lorry using the same lane. After having been immobilised by the crash into the rear of their car which was an external factor beyond their control, had the persons in the control room reported to the police it may still have been possible to stop the lorry at the Butterworth exit. According

A to SD2, Alan Tan told him he had contacted VIPERS but Tan died before the trial and no one from VIPERS was called to confirm that this was done. It was also pleaded in the defence that the officer in the control room had called VIPERS, Sungai Petani Police Station and Bertam police station but SP3 said that there was no record of
B any call to the Sungai Petani Police Station. The person in the control room was Ibrahim but he was not called as a witness. On the facts, I found that (i) and (v) of the particulars of negligence in para. 8 of the statement of claim were proved on a balance of probabilities. Unlike the case of *Smart Modular Technologies Sdn Bhd*
C *v. Federal Express Services (M) Sdn Bhd* [2006] 2 SLR 797, where the defendant was a general courier and not a specialist company providing high security transport services, the defendant in this case was engaged to provide an armed escort after being made aware of two previous hijacking attempts. They would have discharged their
D responsibility by keeping the lorry within sight and reporting the incident to the police but there was no proof that the incident was reported to the police. As to the failure to use firearms, I accepted the explanation of SD1 and SD2 that the use of firearms was not advisable as there was heavy traffic on the road and he did not
E shoot at the lorry as he was unsure if the driver was still in it.

[10] It was pleaded that the loss was caused wholly by Sanshin's negligence. Particulars (i)-(iii) of para. 11 of the statement of defence were not made out as SD2 candidly admitted that he was
F told of two prior hijacking attempts. It was therefore incumbent on SD2 rather than Sanshin to brief Gwenken's agents about those attempts and how to prepare themselves in the event of a hijacking. The failure to engage an extra driver did not amount to negligence as it is not shown how such a measure would have helped.
G Similarly, it was not shown that the timing of the journey was the sole cause of the loss. Contributory negligence was not in issue. Learned defence counsel conceded that he did not challenge the value of the cargo. Despite the fact that the liability was totally out of proportion to the fee for the assignment of only RM100, I found
H that the plaintiff had proved its case and entered judgment accordingly.

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